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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

PUGET SOUND POWER & LIGHT COMPANY, a corporation, and OLD COLONY TRUST COMPANY, a corporation,

Petitioners,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF WHATCOM COUNTY, a municipal corporation.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit

— and —

BRIEF IN SUPPORT OF PETITION

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THE ARGUS PRESS, SEATTLE

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vs.

PUBLIC UTILITY DISTRICT NO. 1 OF WHATCOM COUNTY, a municipal corporation.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit

---

Puget Sound Power & Light Company, a corporation, and Old Colony Trust Company, a corporation, petitioners, respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered October 24, 1941 (R. 1877) affirming the judgment of the United States District Court for the Western District of Washington, Northern Division (R. 159).

STATEMENT

This is a proceeding in eminent domain brought by Public Utility District No. 1 of Whatcom County, a municipal corporation of the State of Washington, against Puget Sound Power & Light Company, a Mas-

sachusetts corporation, Old Colony Trust Company, a Massachusetts corporation, and Harris Trust and Savings Bank, an Illinois corporation. During the trial Harris Trust and Savings Bank was, upon stipulation of the parties, dismissed from the proceeding (R. 152, 153). Petitioner Old Colony Trust Company is a mortgagee of the property involved and will receive no further mention herein. Petitioner Puget Sound Power & Light Company will be called the "Company" and the respondent, Public Utility District No. 1 of Whatcom County, will be called the "District."

The action was commenced April 18, 1939, in the Superior Court of the State of Washington for Whatcom County (R. 2-73). On May 6, 1939, the cause was removed to the United States District Court for the Western District of Washington, Northern Division, upon the ground of diversity of citizenship (R. 74-89). Said District Court is hereinafter referred to as the "Trial Court."

The District seeks to condemn the electrical properties owned and operated by the Company in Whatcom County, Washington, together with two transmission lines extending in a southerly direction into adjoining Skagit County. Pursuant to the Washington law and practice (see *Washington ex rel. Grays Harbor Logging Co. v. Superior Court*, 243 U.S. 251) the cause was first heard by the Trial Court upon the issue of public use and necessity, and on July 31, 1939, a decree of public use and necessity was granted (R. 110-144).

On April 30, 1940, the cause came on for trial before the court and a jury (R. 190) for the purpose

of determining the just compensation to be paid the Company (1) for the property to be taken, and (2) for the severance damages to the remainder of the Company's property not taken. The trial continued until August 7, 1940, when the jury returned its verdict in the sum of $5,000,000 (R. 158). Judgment upon this verdict was entered August 24, 1940 (R. 159-162).

The petitioners appealed to the Circuit Court of Appeals from the decree of public use and necessity and from the final judgment upon the verdict of the jury (R. 163). In its opinion filed October 24, 1941, (R. 1832) the Circuit Court of Appeals affirmed the decree and judgment of the Trial Court, the opinion, concurring opinion and dissenting opinion being published at 123 F.(2d) 286. No petition for rehearing was filed.

For a further statement petitioners rely upon the following taken from the majority opinion of the Circuit Court of Appeals (R. 1834-1835):

> "* * * The company's present unified or integrated system of generating, transmission and distribution facilities, is the result of nearly 50 years of development of the electric industry in Western Washington. During that period, the company has become the successor in the operations of 148 predecessor corporations. The company's entire system extends into and serves all or part of 19 counties in Central and Western Washington. It distributes electricity over approximately 4,300 square miles of territory. It has 13 hydroelectric generating plants with a capacity of 202,000 kilowatts and 3 steam plants with a capacity

of 104,500 kilowatts, the energy being transmitted over 1,538 miles of transmission lines, and distributed over 8,900 miles of distribution lines to more than 190,000 customers.

"The company operates in Whatcom County, the boundaries of which are also the boundaries of appellee district. The properties sought by appellee (District) lie in Whatcom County with the exception of two transmission lines extending to substations in Skagit County, and include the entire electric distribution system of the company in the former county, and a small hydro-electric plant of 1750 kilowatts capacity. The properties sought to be taken by appellee (District) serve about 9% of the total customers of the company in all operations, or 17,600, but the only generating system to be taken has sufficient capacity to serve only about 10% of the 17,600 customers in Whatcom County."

JURISDICTION

The jurisdiction of this Court is based upon Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938 (28 U.S.C.A. Sec. 347).

This petition is timely filed. The judgment of the Circuit Court of Appeals was entered October 24, 1941 (R. 1877). Under Section 8 (a), Act of February 13, 1925 (28 U.S.C.A. Sec. 350) the application for writ of certiorari may be made within three months after the entry of judgment. The fact that the mandate of the Circuit Court of Appeals has already issued to the District Court is immaterial and does not render this application untimely.

The Conqueror, 166 U.S. 110, 113;
Louisville & Nashville R. R. Co. v. Behlmer, 169 U.S. 644;
Carr v. Zaja, 283 U.S. 52, 53.

The jurisdiction of the Circuit Court of Appeals is based upon 28 U.S.C.A. Sections 225 and 230 and the Rules of Civil Procedure, Rule 73.

The jurisdiction of the District Court is based upon 28 U.S.C.A. Sections 41 (1), 71 and 72.

QUESTIONS PRESENTED

The first question relates to the validity of the decree of public use and necessity. The other questions relate to the correctness of certain rulings of the court during the trial on the issue of just compensation.

Public Use and Necessity

1. Where it appears without dispute that an

equivalent system could be built by the District speedily and economically, and that the real purpose of the condemnation is to establish a District-owned monopoly, is the District's determination of necessity for the condemnation arbitrary or capricious?

Elimination of Contractor's Profit

2. Did the Trial Court err in limiting the jury's consideration of an allowance for contractor's profit and expense in the estimate of present reproduction cost of the property?

Severance Damage to Bellingham Office Building

3. (a) Was the witness S. P. MacFadden, as Vice President in charge of all operations of the Company, qualified to testify to the diminution in value of the Bellingham office building caused by the taking of the balance of the Company's property in Whatcom County?

(b) Was the testimony of the witness O. C. Scudder, as to severance damage to the Bellingham office building, based on an incorrect method of estimating the damage?

District's Offer of Wholesale Power Contract

4. Should the jury be permitted to consider in reduction of severance damages the resolution adopted by the District during the trial offering to enter into a five-year contract with the Company for wholesale power at a rate subject to revision by the state regulatory body?

REASONS RELIED ON FOR ALLOWANCE OF WRIT

Public Use and Necessity

1. The commissioners of the District adopted a resolution finding that it was necessary to condemn the Company's properties. The evidence shows without dispute that an equivalent system could be built by the District speedily and economically. On the other hand, the District proposes to take the Company's retail distribution system in Whatcom County and leave on the Company's hands the generating capacity built to supply such retail market, thus causing great harm to the Company. The real purpose of the condemnation is to establish a District-owned monopoly in order to eliminate all competition.

The Circuit Court of Appeals held that the determination of the District commissioners was not arbitrary. This is contrary to the law of the State of Washington as established in *State of Washington v. Superior Court*, 128 Wash. 79, 222 Pac. 208, and other cases, holding that the question of necessity in condemnation cases is a judicial one and that where great damage will be done to the property owner, with relatively little benefit to the taker, no legal necessity is shown.

Instruction to Eliminate Contractor's Profit

2. The Trial Court instructed the jury that in giving consideration to evidence of any cost of reproduction new studies containing allowances for general contractor's profit it should eliminate any such allow-

ances as were not represented by corresponding savings in material and labor costs. The instruction constitutes an undue limitation on the consideration to be given by the jury to the Company's evidence of reproduction cost and in effect told the jury to eliminate the allowance of about $500,000 for contractor's profit and expense included in the total cost of reproduction new appraisal of the Company's witness N. T. Veatch, Jr.

This is contrary to the following cases, among others: *Cary v. Corporation Commission of Oklahoma* (3-Judge D.C., Okla.) 17 F. Supp. 772, and *Brooklyn Borough Gas Co. v. Prendergast* (3-Judge D.C., N.Y.) 16 F.(2d) 615, 628, 638, which hold that in a reproduction cost estimate it is proper to assume the property would be constructed by a contractor and to allow a reasonable sum for contractor's profit.

Severance Damage to Bellingham Office Building

3. (a) S. P. MacFadden is Vice President in charge of all operations of the Company. His testimony that the severance damage to the Bellingham office building would be $108,000 was stricken by the Trial Court.

In approving such action, the Circuit Court of Appeals refused to apply the Washington rule that a corporate officer occupies the position of owner and is competent to testify to the value of the property of the corporation, as held in *Weber v. West Seattle Land & Improvement Company*, 188 Wash. 512, 63 P.(2d) 418, and *Wicklund v. Allraum*, 122 Wash. 546, 211 Pac. 760, upon the stated ground that the witness

gave not his own opinion but that of experts. As pointed out by Judge Stephens in his dissenting opinion (R. 1871-1872), this is not a fair construction of the witnesess's testimony.

(b) O. C. Scudder, a qualified real estate expert, testified that the diminution in market value of the Bellingham office building caused by the taking would be $108,000. The ruling of the Trial Court striking his testimony was upheld by the Circuit Court of Appeals apparently on the ground that the witness had failed to follow the approved method of proof of damages in condemnation proceedings in that he did not state the value before and after the taking.

This is contrary to the rule in the State of Washington as established in *Seattle & M. Ry. Co. v. Gilchrist*, 4 Wash. 509, 30 Pac. 738; *Ingram v. Wishkah Boom Co.*, 35 Wash. 191, 77 Pac. 34, and *King County v. Joyce*, 96 Wash. 520, 165 Pac. 399, which hold that a witness, if properly qualified, may give his opinion as to severance damage without stating the value before and after the taking.

District's Offer of Wholesale Power Contract

4. The District was permitted to introduce in evidence, in reduction of the severance damages to which the Company was entitled, its offer to enter into a five-year contract with the Company for the purchase of electricity wholesale at a rate subject to revision by the state regulatory body.

This is contrary to the Washington Constitution, Article I, Section 16, which provides that the just com-

pensation to which the owner is entitled must be paid in *money*, and to the state law as expressed in *State ex rel. Peabody v. Superior Court*, 77 Wash. 593, 613, 138 Pac. 277, and other cases, holding that a mere offer to assume contractual obligations in favor of the owner cannot be considered on the issue of just compensation. It is also in conflict with the holding of the Eighth Circuit Court of Appeals in *Board of Directors of St. Francis Levee District v. Webb*, 188 Fed. 67, to the same effect.

Divided Court Below

5. This cause was heard by three Circuit Judges, each of whom filed a separate opinion. Judge Haney held that there was no reversible error and that the decree and judgment of the Trial Court should be affirmed. Judge Garrecht concurred in the opinion of Judge Haney but differed as to the ground for upholding the Trial Court's action in striking the testimony concerning severance damage to the Bellingham office building. Judge Stephens filed a dissenting opinion in which he states (R. 1854):

> "My dissent is based upon my conviction that by an instruction given the jury the appellants were erroneously deprived of the benefit of Mr. Veatch's testimony as to the element of contractor's profit in his 'reproduction new' valuation; and that the Court erroneously struck from the record all of the severance damage testimony relating to the Bellingham office building.
>
> "These are substantial items, and if either constitutes error there is no recourse open save reversal."

Judge Stephens was of the view that the judgment should be reversed.

The law established in this proceeding is of great importance. Public utility districts similar to the district involved in this proceeding have been established in thirty counties in the State of Washington as well as in other states. Condemnation actions are pending against this and other public utility companies in Federal and state courts. This is apparently the first of such actions finding its way into the Circuit Courts of Appeals. It involves not only the right to condemn but also other questions which are likely to arise in future trials of this character.

Although there are seven Circuit Judges in the Ninth Circuit Court of Appeals, only two members thereof have set a precedent for the remaining judges. The result may well be different in another appeal if other judges sit. Until the decision of this Court in *Textile Mills Securities Corporation v. Commissioner of Internal Revenue*, October Term, 1941, No. 34, ... U. S. ....., 86 L. ed. (Adv. Op.) 242, there was no method of obtaining a rehearing *en banc* before the Ninth Circuit Court of Appeals because of its ruling in *Lang's Estate v. Commissioner*, 97 F.(2d) 867, that no more than three judges could sit in any case. The *Textile Mills* case was decided by this Court December 8, 1941, after the time had expired for filing a petition for rehearing in the instant proceeding.

This Court should now review the matter and settle the issues raised.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari to review the decision of the Circuit Court of Appeals for the Ninth Circuit should be granted.

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